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IN THE

Supreme Court of the United States

October Term, 1987

LIONEL RICHIE, INDIVIDUALLY AND DOING BUSINESS AS BROCKMAN MUSIC, JAMES ANTHONY CARMICHAEL, AND MOTOWN RECORD CORPORATION,

Petitioners,

vs.

GENE THOMPSON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED

1. Whether, as the Court of Appeals held in reversing a grant of summary judgment to Defendant- Petitioner, summary judgment is disfavored on the issue of substantial similarity in a copyright infringement suit.

2. Whether the lack of a "bright line" test for substantial similarity requires the court to submit the issue of substantial similarity to a jury in musical copyright infringement actions even when the court agrees that there is no or little similarity between the two works.

3. Whether a District Court's grant of summary judgment to a defendant in a copyright infringement suit may be reversed notwithstanding the reviewing Court's conclusion that the two works in question have little similarity.

4. Petitioners refer to the questions presented in the pending petition for a writ of certiorari in *Williams, et al. v. Baxter*, No. 87-491, and incorporate said questions herein.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 3

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 8

I SUMMARY JUDGMENT IS NOT DISFAVORED IN COPYRIGHT INFRINGEMENT ACTIONS 10

A. The Court Below Has Revived the Discredited "Slightest Doubt" Rule of Arnstein v. Porter 10

B. The Ninth Circuit Approach is at Odds with that of the Second Circuit 15

C. The Opinion Below Conflicts with This Court's Instructions on Summary Judgment 17

II THE COURT ERRED IN REVERSING A GRANT OF SUMMARY JUDGMENT DESPITE ITS AGREEMENT THAT THERE WAS LITTLE OR NO SIMILARITY BETWEEN THE SONGS 20

A. Plaintiff Must Prove a Genuine Issue of **Substantial** Similarity, Not Simply of Similarity 23

B. The Songs Are Not Substantially Similar 25

C. Plaintiff's "Expert" Could Not Create an Issue of Fact When the Songs Reveal No Such Issue 26

CONCLUSION 29

APPENDIX A A-1
Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit

APPENDIX B B-1
Order Denying Petition for Rehearing

APPENDIX C C-1
Judgment of the United States District Court for the Central District of California

APPENDIX D D-1
Statement of Uncontroverted Facts and Conclusions of Law of the United States District Court for the Central District of California

APPENDIX E E-1
Order Granting Defendants' Motion for Costs and Attorney Fees, United States District Court for the Central District of California

APPENDIX F F-1
Pertinent Statutory Provisions

TABLE OF AUTHORITIES

CASES

Anderson v. Liberty Lobby,
477 U.S. 242, 106 S.Ct. 2505
(1986) 18,23,24

Arnstein v. Porter,
154 F.2d 464 (2d Cir. 1946),
cert. denied, 330 U.S. 851 (1947) 12,13,15
25,26

Atari, Inc. v. North American Philips,
672 F.2d 607 (7th Cir. 1982) 26

Beal v. Lindsay,
468 F.2d 287 (2d Cir. 1972) 14

Berkic v. Crichton,
761 F.2d 1289 (9th Cir.),
cert. denied, 414 U.S. 826 (1985) 11,22
25,28

Carew v. R.K.O. Radio Pictures, Inc.,
43 F.Supp. 199 (S.D.Cal. 1942) 17,19

Celotex Corp. v. Catrett,
477 U.S. 317 (1986) 17,19

Darrell v. Joe Morris Music Co.,
113 F.2d 80 (2d Cir. 1940) 23

Davis v. United Artists, Inc.,
547 F.Supp. 722 (S.D.N.Y. 1982) 17,19

Dellar v. Samuel Goldwyn, Inc.,
150 F.2d 612 (2d Cir. 1945),
cert. denied, 327 U.S. 790 (1946) 16,19

Durham Industries, Inc. v. Tomy Corp.,
630 F.2d 905 (2d Cir. 1980) 21

Ferguson v. National Broadcasting Co., Inc.,
584 F.2d 111 (5th Cir. 1978) 14

First National Bank of Arizona v.
Cities Service Co.,
391 U.S. 253 (1968) 13

Frybarger v. International Business
Machines Corp.,
812 F.2d 525 (9th Cir. 1987) 10,11,21

Hall v. Paramount
Pictures Corp., 449 U.S. 849 (1980) 14

Harold Lloyd Corp. v. Witwer,
65 F.2d 1 (9th Cir. 1933) 25

Heim v. Universal Pictures Co.,
154 F.2d 480 (2d Cir. 1946) 21

Hoehling v. Universal City Studios, Inc.,
618 F.2d 972 (2d Cir. 1980), cert.
denied, 449 U.S. 841 (1980) 15

International Business Machines Corp.,
812 F.2d 525 (9th Cir. 1987) 11

Litchfield v. Spielberg,
736 F.2d 1352 (9th Cir.
1984), cert. denied, 470 U.S.
1052 (1985) 11,16,25

Matsushita Electric Industrial Co. v.
Zenith Radio,
475 U.S. 574, 106 S.Ct. 1348
(1986) 19

Maxtone-Graham v. Burtchaell,
803 F.2d 1253 (2d Cir. 1986), cert.
denied, U.S. 107 S.Ct. 2201 (1987) 13

Nichols v. Universal Pictures Corp.,
45 F.2d 119 (2d Cir. 1930),
cert. denied, 282 U.S. 902 (1931) 27

O'Neil v. Dell Publishing Co., Inc.,
630 F.2d 685 (1st Cir. 1980) 27

Overman v. Universal City Studios, Inc.,
605 F.Supp. 350 (C.D.Cal. 1984),
aff'd mem., 767 F.2d 933 (1985) 21

Peter Pan Fabrics, Inc. v.
Martin Weiner Corp.,
274 F.2d 487 (2d Cir. 1960) 25

Scott v. Paramount Pictures Corp.,
449 F. Supp. 518 (D.D.C. 1978),
aff'd without op., 607 F.2d 494
(D.C.Cir. 1979), cert. denied sub nom. 14

See v. Durang,
711 F.2d 141 (9th Cir. 1983) 12,21,25

JOSEPH F. CLERK

Sid & Marty Krofft Television, Productions, Inc. v. McDonald's Corporation
562 F.2d 1157 (9th Cir. 1977) 13

Twentieth Century-Fox Film Corp. v. MCA, Inc.,
715 F.2d 1327 (9th Cir., 1983) 11

Walker v. Time Life Films, Inc.,
784 F.2d 44 (2d Cir.), cert. denied,
__ U.S.__ , 106 S.Ct. 2278 (1986) 22

Warner Bros. Inc. v. American Broadcasting Companies, Inc.,
720 F.2d 231 (2d Cir. 1983) 15,19,25

STATUTES AND REGULATIONS

Article I, Sec. 8 of the Constitution
of the United States 9

Title 17, United States Code
Section 102(a) 3
Section 102(b), 3
Section 106 3
Section 501(a) and (b) 3
Section 505 3

Title 28, United States Code
Section 1254(1) 2

Federal Rules of Civil Procedure
Rule 56 3

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1987

LIONEL RICHIE, *et al.*,

Petitioners,

vs.

GENE THOMPSON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Lionel Richie (individually and doing business as Brockman Music), James Anthony Carmichael, and Motown Record Corporation,[1/] (defendants and appellees below) respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United

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1/ For purposes of Rule 28.1, Motown Record Corporation is affiliated with Jobette Music Co., Inc. and Stone Diamond Music Corporation.

States Court of Appeals for the Ninth Circuit entered in the above-entitled action on June 11, 1987.

OPINIONS BELOW

The June 11, 1987 Opinion ("the Opinion") of the United States Court of Appeals for the Ninth Circuit is appended as Appendix A. The Opinion was not reported. The unreported order of August 14, 1987 denying rehearing is appended as Appendix B. The summary judgment entered by the United States District Court for the Central District of California on June 20, 1986 is appended as Appendix C. It was not reported. The unreported Statement of Uncontroverted Facts and Conclusions of Law filed by the District Court on June 19, 1986 upon the grant of summary judgment is appended as Appendix D. The unreported Order Granting Defendants' Motion for Costs and Attorneys Fees filed by the District Court on September 11, 1986 is appended as Appendix E.

JURISDICTION

The Opinion of the Court of Appeals was dated June 11, 1987. The Court denied petitioners' petition for rehearing on August 14, 1987, and this petition for a writ of certiorari was filed within ninety (90) days of that date. This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent provisions of sections 102(a), 102(b), 106, 501(a) and (b), and 505 of the Copyright Act of 1976, [17 U.S.C. §102(a), 102(b), 106, 501(a) and (b), and 505], and Rule 56 of the Federal Rules of Civil Procedure are reprinted in Appendix F.

STATEMENT OF THE CASE

Lionel Richie is a popular, accomplished and successful singer and songwriter. In 1983, he recorded a phonograph album entitled "Can't Slow Down." Within a very few weeks, the album was the number one selling record album in the country. The record was produced by Richie and James Anthony Carmichael and was released by Motown Record Corporation. The musical compositions appearing on the phonograph album were published by Richie, doing business as Brockman Music.

Two of the songs composed by Richie which appeared on the "Can't Slow Down" album were "Hello" and "Stuck On You." Aside from their success as part of the "Can't Slow Down" album, both "Hello" and "Stuck On You" were hugely popular successes as single releases.

On March 7, 1985, Gene Thompson filed a suit in the United States District Court for the Central District of California naming Richie, Carmichael, Motown and Brockman as Defendants and alleging that they had infringed the copyright in his unpublished musical composition, "Somebody's Got to Love Her." The complaint alleged that both "Hello" and "Stuck On You" infringed Thompson's single musical composition.

The defendants moved for summary judgment, contending that neither "Hello" nor "Stuck On You" was substantially similar to "Somebody's Got To Love Her." Because there was no genuine issue of material fact with respect to substantial similarity, defendants did not (for purposes of the summary judgment motion only) contest access to "Somebody's Got To Love Her" or plaintiff's ownership of the copyright in that song.

In moving for summary judgment, the defendants provided the District Court with audiocassette tapes containing "Somebody's Got To Love Her," "Hello," and "Stuck On You."2/ The District Court thus was able to compare the subject works. The version of "Somebody's Got To Love Her" which was submitted is apparently the only version of the song which exists. It was a tape provided to defendants by plaintiff in discovery and is also the tape which the plaintiff deposited with the Copyright Office upon registering his copyright. "Somebody's Got To Love Her" was never printed or written in the form of sheet music or any other form of musical notation. The recordings of "Hello" and "Stuck On You" submitted to the Court were the versions which were released by defendants for public

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2/ An audio cassette tape containing the original renditions of both "Somebody's Got To Love Her" and "Stuck On You" has been lodged with the Clerk of this Court. Defendants submit that the eight minutes which it would take to listen to this tape can explain, in a manner which can be much more clearly perceived than any number of pages of legal argument, why the decision of the Ninth Circuit effectively precludes any defendant in any musical copyright infringement suit from obtaining summary judgment on the issue of substantial similarity. There is simply no similarity whatsoever between the two songs.

distribution. By submitting the audiocassette, defendants precluded any dispute as to the similarity of the works.

In response to the Motion for Summary Judgment, plaintiff abandoned his claim that "Hello" infringed the copyright in his song. However, he continued to claim that his copyright was infringed by "Stuck On You." The only evidence submitted by the plaintiff in opposition to the Motion for Summary Judgment was a declaration from an "expert," a professor of classical music who had no expertise or background in the field of modern popular music. Plaintiff's expert contended that "Stuck On You" and "Somebody's Got To Love Her" were strikingly similar. However, he based this conclusion not upon the original compositions, but rather upon altered versions of the two songs which he had prepared in a fashion which created similarities where none had previously existed.

Defendants responded to the submission of plaintiff's expert testimony by objecting to its introduction on the grounds that (1) case law in the Ninth Circuit and elsewhere made it clear that testimony of "experts" is inadmissible on the issue of substantial similarity of expression, (2) plaintiff's "expert" was not qualified to opine in the field of modern popular music, and (3) the testimony offered by plaintiff's expert was based upon misleading and inadmissible renditions of the two songs rather than the original songs themselves. Defendants also submitted a declaration of an expert musicologist who explained the inaccuracies in the plaintiff's expert's analysis and demonstrated that there was no substantial similarity between the two works. Moreover, he demonstrated that the similarities alleged to exist by plaintiff's expert

consisted of minor musical elements common to other songs in the field of popular music.

On June 19, 1986, the District Court granted summary judgment in favor of the defendants, and judgment was entered the following day. In its judgment, the court expressly found "that there is no substantial similarity of ideas and expression between the plaintiff and the defendant Richie's musical composition." Appendix C at C2. In its Statement of Uncontroverted Facts and Conclusions of Law filed with the judgment, the Court found:

> 10. There is no substantial similarity of expression between plaintiff's composition and the defendant's composition. After reviewing the audio cassettes and the lyrics, the Court finds that the ordinary average layperson could not conclude that there existed substantial similarities of expression between the subject works.
>
> 11. Further, it is apparent to the Court that there is no substantial similarity of ideas between the subject works.

Appendix D at D3-4.

Defendants subsequently moved for full costs and attorney fees pursuant to 17 U.S.C. §505. Concluding that plaintiff's claim was frivolous, the District Court granted the motion on September 11, 1986 and awarded defendants $31,642 in attorneys' fees and $2,665.55 in costs. The court concluded:

> After listening to the tapes of both songs and reviewing the music sheets, the Court distinctly found that a reasonable person would not find any similarity

> between the two compositions in their forms of expression or ideas. Therefore, considering all surrounding circumstances in this case, Plaintiff's claim for copyright infringement was frivolous.

Appendix E at E3.

The plaintiff appealed, and on June 11, 1987, the United States Court of Appeals for the Ninth Circuit reversed the judgment despite the fact that it agreed that "the two songs appear to have little similarity." Appendix A at A4. In reversing the summary judgment, the Court *twice* observed that "since substantial similarity is usually an extremely close question of fact, summary judgment is disfavored." Appendix A at A4. The Court also concluded that

> Since there is 'no bright line . . . as to what quantum of similarity is permitted before crossing into the realm of substantial similarity,' Baxter, 812 F.2d at 425, we feel the ears of the court must yield to the ears of the jurors.

Appendix A at A4.

The Court also noted plaintiff's expert testimony. The Court concluded that there was an issue of fact as to similarity of expression and that it could not say that the two songs were so dissimilar as to justify summary judgment, notwithstanding its own observation that the two songs appeared to have little similarity.

Because the Court of Appeals concluded that the District Court had improperly granted summary judgment, it also reversed the award of costs and attorney fees.

REASONS FOR GRANTING THE WRIT

The Opinion below, like other recent rulings by the Ninth Circuit in copyright infringement cases,[3/] is indicative of an approach in the Ninth Circuit that is hostile to summary judgment in copyright infringement cases and which is at odds with recent pronouncements of this Court and of other circuits. In contrast to the growing recognition that summary judgment is not "disfavored" and is, in fact, appropriate when the plaintiff has failed to raise a genuine issue of material fact, the Ninth Circuit's approach

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3/ See the discussion in the petition for certiorari filed in Williams, et al. v. Baxter, No. 87-491. Williams presents many issues similar to those raised in the present petition, and petitioners incorporate the issues and arguments raised in Williams' petition into this petition. In fact, in the case at bar the Ninth Circuit relied heavily upon its opinion in Baxter--Baxter v. MCA, 812 F.2d 421 (9th Cir., 1987). See Opinion, Appendix A at A-3. Petitioners submit that if the Court grants the petition for a writ of certiorari in Baxter, it would be appropriate to hear Baxter on a consolidated basis with this case. However, the petition in this case also presents additional grounds for a writ of certiorari and reversal. Baxter, for example, did not rely upon the challenged notion that summary judgment is disfavored on the issue of substantial similarity (although the initial opinion in Baxter did rely on this proposition. See discussion infra). Nor did the Court in Baxter expressly opine, as was stated here, that there was little similarity between the two works. Rather, it expressly declined to take any position on the substantial similarity of the works in question, concluding only that reasonable minds could differ on that question. 812 F.2d at 425.

appears to require that the issue of substantial similarity be submitted to a jury in virtually every musical copyright infringement action (" . . . the ears of the court must yield to the ears of the jurors"). The inevitable result of such an approach is that popular songwriters and musicians will find themselves increasingly subjected to meritless copyright infringement actions which *will* proceed to expensive and often lengthy trials even when there is no or little similarity between the plaintiff's and the defendant's songs. This will discourage, not promote, the arts and is indirect contrast to the constitutional and philosophical purpose of the law of copyright. *See* Article I, Sec. 8 of the Constitution.

The case at bar provides a stark example of such a situation. Both the District Court and the Court of Appeals agreed that there was no similarity or little similarity between "Somebody's Got to Love Her" and "Stuck on You." The District Court even concluded that the lack of similarity was so palpable that attorney fees were appropriate due to the plaintiff's frivolous claim. Even a cursory review of the short audiocassette tape of the two songs which has been lodged with the Clerk reveals the absence of any genuine issue of material fact with respect to substantial similarity.

The only response of the Court of Appeals to such a situation was its general conclusion that substantial similarity is "usually an extremely close question of fact"; therefore, "summary judgment is disfavored." Opinion, Appendix A at A4. Because there is "no bright line . . . as to what quantum of similarity is permitted before crossing into the realm of substantial similarity, . . . the ears of

the court must yield to the ears of the jurors." *Id.* The obvious result is that courts in the Ninth Circuit will refuse to grant summary judgment to defendants in musical copyright infringement cases even when it is clear that the two songs in question are not substantially similar.

I
SUMMARY JUDGMENT IS NOT DISFAVORED IN COPYRIGHT INFRINGEMENT ACTIONS

A. The Court Below Has Revived the Discredited "Slightest Doubt" Rule of Arnstein v. Porter.

Essential to the Ninth Circuit's ruling in the case at bar was its conclusion that "since substantial similarity is usually an extremely close question of fact, summary judgment is disfavored." Opinion, Appendix at A4. This conclusion is simply wrong. In fact, it is illogical on its face as a basis for denying summary judgment in any given case, for it begs the question whether, *in the particular case before the court*, there is an extremely close question of fact. Even if the generalization that this question usually is extremely close were true, such a conclusion does not justify a sweeping rule that essentially raises a *presumption* that there is a genuine issue of material fact in any copyright infringement action. Each case should be decided on its own merits, and when the question of substantial similarity in a given case is not close, the courts should not indulge any presumption to the contrary.

The sole authority relied upon by the Ninth Circuit for the proposition that summary judgment is disfavored was its recent opinion in *Frybarger v.*

International Business Machines Corp., 812 F.2d 525 (9th Cir. 1987). *Frybarger*, however, did not state the proposition in such categorical terms. Rather, it simply noted that *generally*, summary judgment is not *highly favored* on the issue of substantial similarity. 812 F.2d at 528. Moreover, *Frybarger* went on to note that "the question whether there is substantial similarity of *ideas* between two works may often be decided as a matter of law,'" and there is no special standard for determining "whether summary judgment is appropriate on the issue of substantial similarity of *expression*.'" *Id.* (emphasis in original; citations omitted). In its opinion below in the case at bar, however, the Court did not acknowledge that summary judgment is *ever* appropriate on the issue of substantial similarity. To the contrary, it simply and expressly stated that summary judgment is disfavored. The Court failed to provide any guidelines or standards other than to suggest as a matter of course that "the ears of the Court must yield to the ears of the jurors."

Frybarger, in turn, relied upon three earlier Ninth Circuit cases: *Berkic v. Crichton*, 761 F.2d 1289 (9th Cir.), *cert. denied*, 474 U.S. 826 (1985); *Litchfield v. Spielberg*, 736 F.2d 1352, 1355 (9th Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985); and *Twentieth Century-Fox Film Corp. v. MCA, Inc.*, 715 F.2d 1327, 1330 n. 6 (9th Cir., 1983). *Litchfield* and *Berkic*, however, acknowledged that summary judgment is often appropriate in copyright cases and, in fact, *affirmed* grants of summary judgment to defendants. *Twentieth Century Fox* also noted that summary judgment has "traditionally" been disfavored in copyright litigation, but went on to "emphasize that summary judgment determinations result from close

factual analyses, and are inherently peculiar to each case." 715 F.2d at 1330 n. 6.

The antagonistic approach to summary judgment in copyright cases adopted by the Court below is, in fact, at odds with the same Court's recent pronouncements in other copyright cases. For example, in *See v. Durang*, 711 F.2d 141, 142 (9th Cir. 1983), the court stated: "No special standard is applied in determining whether summary judgment is appropriate on the issue of substantial similarity of expression in a copyright case." Although in the Opinion below herein the Court did not mention *See* (which defendants had relied upon in their papers opposing the appeal, and which plaintiff expressly asked the Court to overrule), it implicitly repudiated *See's* neutral approach toward summary judgment in copyright cases.

In fact, the Opinion below appears to revive the discredited doctrine of *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946), *cert. denied*, 330 U.S. 851 (1947), that summary judgment is inappropriate in a copyright infringement action unless there is not the "slightest doubt as to the facts" and unless the similarities between the two works are "trifling." 154 F.2d at 466, 473.[4/]

[4/] Although the Opinion does not expressly refer to Arnstein, it in effect adopts the Arnstein standard. Moreover, in Baxter v. MCA, Inc., 812 F.2d 421 (9th Cir. 1987), the Ninth Circuit did originally rely upon Arnstein. Moreover, it repeated that summary judgment is disfavored on the issue of substantial similarity. Following a petition for rehearing, the Court revised its opinion in Baxter to omit the references to Arnstein and disfavored status of summary judgment. It is the amended opinion which was reported. See the petition for certiorari in Williams v. Baxter, No. 87-491, at 7-8, 25-26, and the Appendix therein at 22.

The *Arnstein* doctrine, which was enunciated by the Second Circuit, has been repudiated by this Court and several other courts, including the Second Circuit and, on prior occasions, the Ninth Circuit. In *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 290 (1968), the Court enunciated the requirement that a party opposing summary judgment come forward with significant probative evidence tending to support his claim. 391 U.S. at 290. The Ninth Circuit subsequently read *First National Bank* as rejecting the *Arnstein* doctrine:

> It is true that *Arnstein's* alternative holding that summary judgment may not be granted when there is the slightest doubt as to the facts has been disapproved. *See, e.g., First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 288-90, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968); . . .

Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corporation, 562 F.2d 1157, 1165 (9th Cir. 1977).

Similarly, the Second Circuit itself has resoundingly rejected *Arnstein*. In *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253 (2d Cir. 1986), *cert. denied*, ___ U.S. __ , 107 S.Ct. 2201 (1987), a copyright infringement case, the Second Circuit stated in an opinion by Judge Kaufman:

> The days of *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946) are behind us. In *Arnstein*, Judge Frank declined to grant

summary judgment although defendants had demonstrated that plaintiff's claim was completely devoid of merit. In *Heyman [v. Commerce and Industry Insurance Co.*, 524 F.2d 1317 (2d Cir. 1975)], we signalled a new direction in our treatment of summary judgment:

> "Although for a period of time this Circuit was reluctant to approve summary judgment in any but the most
> extraordinary circumstances, *see, e.g., Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946), that trend has long been jettisoned in favor of an approach more in keeping with the spirit of Rule 56...."

803 F.2d at 1257 (ellipses in original). The Court affirmed a grant of summary judgment to the defendant.

See also *Beal v. Lindsay*, 468 F.2d 287 (2d Cir. 1972)("The rule of *Arnstein* . . . is no longer good law. *First Nat'l Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 288-290"); *Ferguson v. National Broadcasting Co., Inc.*, 584 F.2d 111 (5th Cir. 1978)("*Arnstein* ... is no longer good law"); *Scott v. Paramount Pictures Corp.*, 449 F. Supp. 518 (D.D.C. 1978), *aff'd without op.*, 607 F.2d 494 (D.C.Cir. 1979), *cert. denied sub nom. Hall v. Paramount Pictures Corp.*, 449 U.S. 849 (1980); all of the foregoing cases expressly rejected the *Arnstein* summary judgment doctrine.

B. The Ninth Circuit Approach is at Odds with that of the Second Circuit.

Whether viewed as a resuscitation of the discredited *Arnstein* doctrine, or simply as an emerging doctrine, the Ninth Circuit's new hostile approach to summary judgment in copyright infringement cases conflicts with the approach of the Second Circuit (theother circuit where the bulk of copyright cases are decided). The Second Circuit has noted that it is taking a more favorable approach to summary judgment in copyright cases. In *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972 (2d Cir. 1980), *cert. denied*, 449 U.S. 841 (1980), the Court observed that while summary judgment had traditionally been frowned upon in copyright cases (citing *Arnstein*), recent cases in the circuit signalled "an important development in the law of copyright, permitting courts to put a swift end to meritless litigation and to avoid lengthy and costly trials." *Id.* at 977.

More recently, the Second Circuit noted its "important responsibility" to grant summary judgment in unmeritorious copyright actions:

> Courts have an important responsibility in copyright cases to monitor the outer limits within which juries may determine reasonably disputed issues of fact. If a case lies beyond those limits, the contrary view of a properly drawn sample of the population, or even a particular jury, cannot be permitted to enlarge (or diminish) the scope of statutory protection enjoyed by a copyright proprietor.

Warner Bros. Inc. v. American Broadcasting Companies, Inc., 720 F.2d 231, 245 (2d Cir. 1983) (affirming summary judgment for defendants

because "a reasonable jury could not conclude . . . substantia[l] similar[ity]." *Id.* at 243.)

This "important responsibility" mandates that summary judgment be granted where, as here, there is no substantial similarity between the subject works.

The importance and propriety of summary judgment in copyright cases cannot be questioned. Federal courts have recognized that the copyright area, perhaps more than any other, involves the bringing of voluminous, groundless claims. These groundless actions have been premised:

> . . . partly upon a wholely erroneous understanding of the extent of copyright protection; and partly upon the obsessive conviction, so frequent among authors and composers, that all similarities between their works and any others which appear later must inevitably be ascribed to plagiarism.

Dellar v. Samuel Goldwyn, Inc., 150 F.2d 612, 613 (2d Cir. 1945), *cert. denied*, 327 U.S. 790 (1946); quoted in *Litchfield v. Spielberg, supra*, 736 F.2d at 1358.

Summary judgment is particularly appropriate in cases such as this, where a popular composer and songwriter typically finds himself accused of plagiarism by multiple would-be songwriters who "hear" or imagine similarities between popular works and their own creations.

> Ordinarily, a composer, or a writer, for that matter, who has presented his composition, or who has played it or made it possible for someone else to hear it played, finds that, a short time after such

> occurrence, the song or the writing is being claimed by another.

Carew v. R.K.O. Radio Pictures, Inc., 43 F.Supp. 199, 200 (S.D.Cal. 1942).

Judge Weinfeld noted the appropriateness of summary judgment in *Davis v. United Artists, Inc.*, 547 F.Supp. 722 (S.D.N.Y. 1982), stating that "[u]nless the summary judgment rule is to be a dead letter, it may properly be and has been enforced even in plagiarism suits. Where there is no genuine issue of fact with respect to the basic legal matters to be decided, a party should not be put to the heavy burden and expense of time consuming litigation. Courts are required in copyright infringement cases, no less than in other types of litigation, to put a swift end to meritless litigation." *Id.* at 723-24.

C. The Opinion Below Conflicts with This Court's Instructions on Summary Judgment.

In holding that summary judgment is disfavored on the question of substantial similarity, the Ninth Circuit has apparently carved out an exception to the general rule that summary judgment is not disfavored. Certainly this Court has never recognized such an exception, and if such an exception is to exist, this Court should have the opportunity to review its propriety.

In fact, this Court has recently noted that "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." *Celotex Corp. v. Catrett*, 477 U.S. 317

(1986). A court wishing to create an exception to this doctrine and to relegate summary judgment to a disfavored status in certain instances surely bears a heavy burden to justify such a departure from the pronouncements of this Court. The Opinion below fails to offer any compelling rationale for such a departure.

This Court has recently repeated that the standard on a motion for summary judgment is whether a reasonable jury could find for the nonmoving party. In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505 (1986), the Court observed:

> And we have noted that the "genuine issue" summary judgment standard is "very close" to the "reasonable jury" directed verdict standard: "The primary difference between the two motions is procedural; summary judgment motions are usually made before trial and decided on documentary evidence, while directed verdict motions are made at trial and decided on the evidence that has been admitted." In essence, though, the inquiry under each is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law."

106 S.Ct. at 2512 (citation omitted).

In *Anderson*, the Court noted that the mere existence of a scintilla of evidence in support of the plaintiff's position will not be sufficient to withstand a summary judgment motion. Rather, the court must ask whether reasonable jurors could find by a preponderance of evidence that the plaintiff is entitled to a verdict.

In *Matsushita Electric Industrial Co. v. Zenith Radio*, 475 U.S. 574, 106 S.Ct. 1348, 1356 (1986), the Court noted that to survive a summary judgment motion, the nonmovant must come forward with specific facts showing that there is a *"genuine issue for trial."* (Emphasis in original.) The factual context must make the plaintiff's claim plausible. *See id.* In the case at bar, there was no genuine issue for trial. Based upon the tape recordings of the subject songs, plaintiff's claim of substantial similarity was totally implausible.

In *Celotex, supra*, the Court held that a party who will have the ultimate burden of proof on an element essential to his case at trial must, in opposing a motion for summary judgment, make a showing sufficient to establish the existence of that element. Yet in the Opinion below, the Ninth Circuit shifted the burden of proof of substantial similarity to defendants by stating that since there is no "bright line" as to what quantum of similarity is substantial, the ears of the court must yield to those of the jury. Essentially, a defendant in a copyright infringement suit cannot obtain summary judgment because he cannot show that the quantum of similarity is beneath a hypothetical "bright line." What should be the plaintiff's burden, even on summary judgment, becomes an insuperable burden for the defendant.

In *Celotex*, the Court spoke of the salutary purpose of summary judgment in a manner similar to that in which the courts treated summary judgment in copyright cases in *Warner Bros. v. American Broadcasting Company, supra, Dellar v. Samuel Goldwyn, Inc., supra, Carew v. R.K.O Radio Pictures, Inc., supra,* and *Davis v. United*

Artists, Inc., supra. The Court observed that "[o]ne of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose." 106 S.Ct. at 2553. The Ninth Circuit's approach to summary judgment in copyright infringement action frustrates this purpose.

II

THE COURT ERRED IN REVERSING A GRANT OF SUMMARY JUDGMENT DESPITE ITS AGREEMENT THAT THERE WAS LITTLE SIMILARITY BETWEEN THE SONGS

Even assuming that the Court of Appeals was correct in positing the disfavored status of summary judgment in copyright actions, the case at bar presented a situation in which the "presumption" against summary judgment clearly was overcome. The Court stated that summary judgment is disfavored because substantial similarity is usually an extremely close question of fact." In this case, however, even the Court appeared to recognize that the the two songs in question do not present "an extremely close question of fact." To the contrary, "the two songs appear to have little similarity." Opinion, Appendix A at A4. Petitioners submit that in this case the question is not even close, and it is for that reason that the order granting summary judgment should have been affirmed. While summary judgment is certainly not favored in close questions, it is the function of summary judgment to ferret out issues which are not close.

It would appear to be self evident that "little similarity" cannot, as a matter of law, amount to

"substantial similarity." Indeed, the courts have often granted and affirmed summary judgment on the issue of substantial similarity after finding that the works in question were no more similar than the two songs at issue in this case.

The Second Circuit stated the obvious in *Durham Industries, Inc. v. Tomy Corp.*, 630 F.2d 905, 912 (2d Cir. 1980), where it acknowledged that there was "a certain amount of similarity apparent in each pair of toys," but nevertheless affirmed a grant of summary judgment. The court noted, "it should be emphasized that under the law only *substantial* similarity will support a determination of infringement." *Id.* at 913 (emphasis in original).

Similarly, in *Heim v. Universal Pictures Co.*, 154 F.2d 480, 487 (2d Cir. 1946), the court observed that "[m]ere similarity is not enough."

In *See v. Durang*, 711 F.2d 141 (9th Cir. 1983), the court noted a number of similarities between the two works in question, but concluded that they were "not sufficient to convince any reasonable trier of fact that the plays are substantially similar." *Id.* at 143.

In *Frybarger v. International Business Machines Corp.*, 812 F.2d 525 (9th Cir. 1987), the Court admitted that "there are numerous similar features in Frybarger's and Gebelli's works," 812 F.2d at 529, but nevertheless affirmed the grant of summary judgment to the defendants.

In *Overman v. Universal City Studios, Inc.*, 605 F.Supp. 350, 352 (C.D.Cal. 1984), *aff'd mem.*, 767 F.2d 933 (1985), the court granted summary judgment to the defendants notwithstanding its observation that portions of the two works were "somewhat similar." *Id.* at 354. The court

concluded that "in sum, none of these asserted similarities is significant in and of itself, and taken as a whole, the overall impact and effect is totally different." *Id.*

Moreover, an issue which the Opinion does not address in this case is the nature of those "little" similarities; *i.e.*, even assuming they were protectable expression and not merely ideas, were they nevertheless unprotectable forms of expression such as scenes a faire or common stock themes? *See, e.g., Walker v. Time Life Films, Inc.*, 784 F.2d 44, 50 (2d Cir.), *cert. denied*, ___ U.S. __ , 106 S.Ct. 2278 ((1986) (numerous similarities related to uncopyrightable expression); *Berkic v. Crichton*, 761 F.2d 1289, 1293-94 (9th Cir.), *cert. denied*, 414 U.S. 826 (1985). In the realm of music, the courts have recognized that due to the practical limitations of the chromatic scale, many combinations of notes, tones and pitches cannot possibly be regarded as exclusive to any particular song.[5/] "[S]uch trite themes as these are bound to

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5/ "Musical signs available for combinations are about 13 in number. They are tones produced by striking in succession the white and black keys as they are found on the keyboard of the piano. It is called the chromatic scale. In a popular song the composer must write a composition arranging combinations of these tones limited by the range of the ordinary voice and by the skill of the ordinary player. To be successful, it must be a combination of tones that can be played as well as sung by almost anyone. Necessarily, within these limits, there will be found some similarity of tone successions." Carew v. R.K.O. Radio Pictures, Inc., 43 F.Supp. 199, 201 (S.D.Cal. 1942) (quoting Marks v. Leo Feist, Inc., 290 F. 959, 960 (2d Cir. 1923)).

recur spontaneously. ... It must be remembered that, while there are an enormous number of possible permutations of the musical notes of the scale, only a few are pleasing; and much fewer still suit the infantile demands of the popular ear." *Darrell v. Joe Morris Music Co.*, 113 F.2d 80 (2d Cir. 1940).

A. Plaintiff Must Prove a Genuine Issue of Substantial Similarity, Not Simply of Similarity.

Given the requirements of substantial similarity and the non-movant's burden on a motion for summary judgment noted above, the plaintiff's burden in opposing a summary judgment motion in a copyright case should be *heavier* than usual. Certainly when there is no more than "little similarity," the plaintiff has failed to meet his burden of raising a genuineissue of material fact on the issue of *substantial* similarity.

Although the requirement of "substantial" similarity is not, strictly speaking, an evidentiary element of burden of proof, the fact remains that it requires that the plaintiff show more than a little similarity. As a practical matter, it increases the plaintiff's burden because the plaintiff cannot prevail if all that he proves is "similarity"; the similarity must be "substantial." As a result, in resisting a motion for summary judgment the plaintiff should be required to demonstrate that there is sufficient evidence of *substantial* similarity; he cannot prevail if all that he has done is to show that there is a genuine issue whether the works are, to some small degree, "similar."

Thus, in *Anderson v. Liberty Lobby*, 477 U.S. 242, 106 S.Ct. 2505 (1986), Court held that in

determining a motion for summary judgment, a court must consider the plaintiff's burden of proof. In *Anderson*, a libel case, it was the plaintiff's burden to prove "actual malice" not by a simple preponderance of evidence, but by clear and convincing evidence. Accordingly, the Court held that "the determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case. This is true at both the directed verdict and summary judgment stages." 106 S.Ct. 2505. Because the "clear and convincing" standard applied in *Anderson*, the Court held that

> the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice *by clear and convincing evidence* or that the plaintiff has not.

Id. (Emphasis added.)

Similarly, the proper standard for summary judgment relating to the element of substantial similarity must be whether the evidence would support a reasonable jury finding that the plaintiff has shown that the two songs are *substantially* similar, not simply that they are similar. "Substantial similarity," although a doctrine of substantive law, in essence incorporates a higher burden of proof ("substantial"). Defendants submit that given the lack of substantial similarity between "Somebody's Got to Love Her" and "Stuck on You," as demonstrated on the tape recordings lodged with the Court below and with this Court

and as admitted in the Opinion, the plaintiff failed to sustain the burden of proof required of him on a summary judgment motion.

B. The Songs Are Not Substantially Similar

A simple review of the recordings of the two songs reveals indisputably that they are not substantially similar. Plaintiff's case fails any of the tests that the courts have announced for substantial similarity. See *Berkic, supra*, 761 F.2d at 1292 (defendant's word must capture "total concept and feel" of plaintiff's work, citing *Litchfield, supra*, 736 F.2d at 1357; works must be substantially similar in "the mood evoked ... as a whole." *Id.* at 1294, citing *See, supra*, 711 F.2d at 144); *Warner Bros. v. American Broadcasting Companies, supra*, 720 F.2d 231, 242 (2d Cir. 1983)("stirring one's memory" of copyrighted work is not the same as appearing to be substantially similar); *Harold Lloyd Corp. v. Witwer*, 65 F.2d 1 (9th Cir. 1933) ("A copy is that which ordinary observation would cause to be recognized as having been taken from or the reproduction of another); *Arnstein v. Porter, supra*, 154 F.2d at 473 (test is "whether defendant took from plaintiff's works so much of what is pleasing to the ears of lay listeners, who lomprise the audience for whom such popular music is composed, that defendant wrongfully appropriated something which belongs to the plaintiff").

While "substantial similarity" is not a term susceptible of precise definition, Judge Learned Hand probably came as close as possible to outlining its parameters in *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960), when he noted that where substantial similarity exists, "the ordinary observer, unless he

set out to detect the disparities, would be disposed to overlook them, and regard their aesthetic appeal as the same." See also *Atari, Inc. v. North American Philips*, 672 F.2d 607, 614 (7th Cir. 1982).

In the context of music, Judge Frank articulated the test as "whether defendant took so much from plaintiff's work of what is pleasing to the ears of lay listeners, who comprise the audience for whom wuch popular music is composed, that defendant wrongfully appropriated something which belongs to plaintiff." *Arnstein v. Porter, supra*, 154 F.2d at 473.

Clearly, a review of the two subject songs reveals that the ordinary listener would not regard their aesthetic appeal as the same or would be disposed to overlook their disparities. Nor by any stretch of the imagination could one conclude that Richie took *anything* from Thompson; certainly he did not take so much of what was pleasing to the ears that he wrongfully appropriated something belonging to Thompson. By any imaginable test, there is no genuine issue of material fact on the issue of substantial similarity in this case.

C. Plaintiff's "Expert" Could Not Create an Issue of Fact When The Songs Reveal No Such Issue.

Aside from the audiocassette tapes of the songs themselves, the only other evidence before the court consisted of affidavits from experts hired by Thompson and Richie. Predictably, plaintiff's hired gun claimed that the two songs were substantially similar and Richie's expert found that

they were not similar.6/ Such "expert" testimony cannot create a genuine issue of material fact when the songs themselves reveal that there is none. As the First Circuit has observed,

> Nor can the testimony of an expert provide what is clearly lacking. Although we may not be qualified literary critics, we are fitted by training and experience to compare literary works and determine whether they evidence substantial similarity. We share Learned Hand's feeling that, in this type of case, expert evidence ought generally to be excluded. *Nichols v. Universal Pictures Corp.*, 45 F.2d at 123. The question of similarity of expression must start with a comparison of the two works. If, as here, it is clearly lacking, then summary judgment should be invoked.

O'Neil v. Dell Publishing Co., Inc., 630 F.2d 685, 690 (1st Cir. 1980). As the court noted in *O'Neil*, Judge Learned Hand had expressed his hostility to the use of expert witnesses on the issue of substantial similarity in *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 123 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931). Judge Hand stated that such testimony "ought not to be allowed at all" because it detracted from the court's task of

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6/ Richie's expert also explained why plaintiffs' "expert" was not qualified in the area of popular music and how he had based his conclusions on erroneous materials and inadequate analysis.

resting on the "firmer, if more naive, ground of its considered impressions on its own perusal." *Id.*

The Ninth Circuit itself has on other occasions noted that expert testimony is inadmissible on the question of substantial similarity of expression. In *Berkic v. Crichton*, *supra*, 761 F.2d 1289, the court noted that the "intrinsic test" for substantial similarity of expression is subjective and depends solely on the response of the ordinary reasonable person. "To that extent, expert testimony or the comparison of individual features of the works is inappropriate in applying the intrinsic test. Rather, the trier of fact ordinarily decides whether the 'total concept and feel' of the two works is substantially similar." *Id.* at 1291.

In fact, in its ruling below the Ninth Circuit implicitly admitted that expert testimony was inadmissible on the issue of substantial similarity of expression. The Court observed that "the extrinsic test [for similarity of *ideas*] relies on expert testimony," but that the intrinsic test [for similarity of *expression*] is subjective, depending "*solely* on the response of the ordinary reasonable person.'" Opinion at A4 (emphasis added).

Thus, the mere fact that plaintiff was able to hire an expert to claim there was substantial similarity could not create an issue of fact when there was no such issue in reality.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 12, 1987

APPENDIX A

FILED
Jun 11 1987
CATHY A. CATTERSON, CL
U.S. COURT OF APPEAL

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GENE THOMPSON,	)	
	)	
Plaintiff-Appellant,	)	No. 86-6185
	)	86-6505
v.	)	
	)	D.C.No.CV85-1583
LIONEL RICHIE, et al.,	)	JMI(Kx)
	)	
Defendants-Appellees.	)	
	)	MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
James M. Ideman, District Judge, Presiding
Argued and Submitted: April 6, 1987
Pasadena, California

Filed: JUN 11 1987

Before: ANDERSON, SKOPIL, and REINHARDT, Circuit Judges.

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

Gene Thompson composed the music and lyrics to a song he entitled "Somebody's Got to Love Her." Thompson's song was copyrighted in 1980, with a certificate of registration, in the form of lyrics and a sound recording, but not as sheet music.

Lionel Richie composed the songs "Stuck On You" and "Hello" in 1983. They became widely distributed and very successful as songs on Richie's phonograph record "Can't Slow Down."

In 1985, Thompson brought a copyright infringement action against Richie, alleging "Stuck On You" and "Hello" infringed his copyright to "Somebody's Got to Love Her." Richie moved for summary judgment on the ground there was no substantial similarity between the works. For purposes of Richie's summary judgment motion, he conceded access to Thompson's work. Thompson opposed the motion and withdrew his claim that the song "Hello" infringed his song. He also submitted the declaration of Dr. Robert Winter, a music expert, who examined and compared "Stuck On You" with "Somebody's Got to Love Her" and found similarities in the melody, harmony and rhythm between the two songs.

The district court reviewed the audio cassettes and lyric sheets of "Stuck On You" and "Somebody's Got to Love Her" and found the works were not of substantial similarity of expression or ideas. The court concluded that the ordinary average lay person could not find the works substantially similar as a matter of law. Accordingly, the district court granted Richie's motion for summary judgment and for costs and attorney's fees of $34,307.65.

Thompson appeals the grant of summary judgment and the fees award. As to each, we reverse.

We review de novo a summary judgment ruling

that there is no substantial similarity between two works in a copyright suit. Frybarger v. IBM, 812 F.2d 525, 528 (9th Cir. 1987). Since the plaintiff in a copyright suit bears the burden of showing that the works are substantially similar, Thompson must show some genuine issue of material fact exissts as to whether a reasonable jury could conclude the works are substantially similar if he is to avoid affirmance of summary judgment. Id. at 529. We believe he has done so.

To establish a claim for copyright infringement, Thompson has to show: (1) he owns the copyright of the work, and (2) "copying" of protectible expression by Richie. See Baxter v. MCA, 812 F.2d 421, 423 (9th Cir. 1987), as amended, slip op. (9th Cir. May 11, 1987). Since direct evidence of copying is rarely available, Thompson can establish copying by circumstantial evidence of: (1) access to the song prior to creation of Richie's song, and (2) substantial similarity of general ideas and expression between the two works. Baxter, 812 F.2d at 423; Frybarger, 812 F.2d at 529.

Thompson's ownership of the copyright to "Somebody's Got to Love Her" is undisputed. Also, for purposes of summary judgment, Richie conceded access to Thompson's work. Therefore, the only question is whether the district court's finding that the works were not substantially similar can sustain the grant of summary judgment.

Under substantial similarity we must determine whether the works are substantially similar (1) in their general ideas (extrinsic test), and (2) in their general expression (instrinsic test). Berkic v. Crichton, 761 F.2d 1289, 1292 (9th Cir.), cert. denied, 106 S.Ct. 85 (1985). The extrinsic test

relies on expert testimony. The intrinsic test, however, "is subjective; it depends solely 'on the response of the ordinary reasonable person.'" Id. (quoting Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp., 562 F.2d 1157, 1162 (9th Cir. 1977)). "[E]xpert testimony . . . is inappropriate in applying the intrinsic test." Id. Since substantial similarity is usually on extremely close question of fact, summary judgment is disfavored. Frybarger, 813 F.2d at 528.

We find an issue of fact with respect to similarity of ideas. Through the use of expert opinion, Thompson attempted to show that of the twenty different pitches in the opening phrases of the two songs, nineteen were nearly identical. Such similarity was also opined in the harmony and the tempo.

Playing the tapes of both songs reveals that there is also an issue of fact as to similarity of expression.

Since there is "no bright line . . . as to what quantum of similarity is permitted before crossing into the realm of substantial similarity," Baxter, 812 F.2d at 425, we feel the ears of the court must yield to the ears of the jurors. While the two songs appear to have little similarity, we cannot say they are so dissimilar as to justify summary judgment. See Frybarger, 812 F.2d at 528 (since substantial similarity is usually an extremely close question of fact, summary judgment is disfavored).

The district court's grant of summary judgment is reversed. In light of our finding of reversal, it follows that the district court erred in finding Thompson's suit frivolous. Therefore, the award of costs and attorney's fees is also reversed.

REVERSED and REMANDED.

APPENDIX B

FILED
AUG 14 1987
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GENE THOMPSON,	)	
	)	
Plaintiff-Appellant,	)	Nos. 86-6185
	)	86-6505
v.	)	
	)	D.C.No.CV85-1583
LIONEL RICHIE, et al.,	)	JMI(Kx)
	)	
Defendants-Appellees.	)	
	)	**ORDER**

Before: ANDERSON, SKOPIL, and REINHARDT, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed.R.App.P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX C

ENTERED
JUN 20 1986
CLERK U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

FILED
JUN 19 1986
CLERK U.S. DISTRICT COUR
CENTRAL DISTRICT OF CALIFO
BY DEPU

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

GENE THOMPSON,	)	Case Nos. CV 85-1583
	)	JMI (Kx)
Plaintiff,	)	
	)	
v.	)	JUDGMENT
	)	
LIONEL RICHIE, et al.,	)	
	)	
Defendants.	)	
	)	

This matter came regularly before the Honorable James M. Ideman, United States District Judge, for consideration. After full consideration of the moving and responding papers, affidavits, and the file in this case, the Court hereby Grants the defendants Motion for Summary Judgment on Plaintff's First Claim for Relief for Copyright Infringement.

For purposes of this motion, the defendants have conceded the issue of plaintiff's ownership of his song "Somebody's Got to Love Her" and the defendants' access to the plaintiff's song. Therefore, the only issue before the Court is

whether there is a substantial similarity of ideas and expressions between the plaintiff's song "Somebody's Got to Lover Her" and the defendant Lionel Richie's song "Stuck on You".

The Court finds that there is no substantial similarity of ideas and expression between the plaintiff and the defendant Richie's musical composition. Therefore, defendants motion for summary judgment is granted.

Further, pursuant to the Joint Status Report filed on January 24, 1986, the parties agreed to the dismissal of Plaintiff's state claims for Intentional Infliction of Emotional Distress and Negligent Infliction of Emotional Distess (page 1 line 27 through page 2 line 2). Therefore, the Court hereby dismisses Plaintiff's pendent state claims.

IT IS SO ORDERED.

DATED: 19 Jun 86

JAMES M. IDEMAN
United States District Judge

APPENDIX D

FILED
JUN 19 1986
CLERK U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFOR
BY DEPUT

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

GENE THOMPSON, Plaintiff,	) Case No. CV 85-1583 JMI (Kx)
v.	) STATEMENT OF UNCONTROVERTED
LIONEL RICHIE, et al., Defendants.	) FACTS AND CONCLUSIONS OF LAW

This matter came regularly before the Honorable James M. Ideman, United States District Judge, for consideration. After full consideration of the moving and responding papers, affidavits, and the file in this case, the Court finds that the following facts and conclusions of law are uncontroverted:

UNCONTROVERTED FACTS

1. In late 1979, plaintiff Gene Thompson composed the lyrics and music to the song

"Somebody's Got to Love Her" (hereinafter "Somebody"). A true audio cassette and a true copy of the lyric sheet were lodged with the Court.

2. On May 27, 1980, plaintiff secured the exclusive rights in the song. Certificate of Copyright Registration as Attached to Plaintiff's Complaint.

3. Defendant Lionel Richie composed the lyrics and music to the song "Stuck on You". A true audio cassette and a true copy of the lead sheet with lyrics were lodged with the Court.

4. The defendant Richie's song "Stuck on You" is not substantially similar in ideas and expression to plaintiff Thompson's "Somebody".

5. Any statement of fact deemed to be a Conclusion of Law is incorporated therein.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1338.

2. To establish a showing of copyright infringement, the plaintiff must prove the following:

a. ownership of copyright; and

b. copying by the defendant.

Sid & Marty Krofft Television, Inc. v. McDonald's Corp., 562 F.2d 1157, 1163 (9th Cir. 1977).

3. The plaintiff can establish copying by proof of the following:

a. circumstantial evidence of access to the protected work; and

b. substantial similarity of ideas and expression between the copyrighted work and the allegedly infringing work. The Court must find both substantial similarity of ideas and expression.

Jason v. Fonda, 526 F.Supp. 774, 776 (C.D. Cal 1981).

4. A determination of whether there is a substantial similarity of ideas is made by applying the extrinsic test. Under this test, the Court must focus on alleged similarities in the objective details of the works. Sid & Krofft, at 1164. Moreover, this question may be decided as a matter of law.

5. A determination of whether there is a substantial similarity of expression is an intrinsic one. This subjective test focuses on the response of the ordinary reasonable person to the works. Litchfield v. Spielberg, 736 F.2d. 1352, 1356 (9th Cir. 1984).

6. Generally, substantial similarity in copyright infringement actions is a question of fact uniquely suited for determination by the trier of fact. Walker v. University Books, Inc., 602 F.2d 859, 864 (9th Cir. 1979). However, sumamry judgment is proper when the Court determines that the similarity between works is proper when the Court determines that the similarity between works in insubstantial as a matter of law. Litchfield, at 1352; 3 Nimmer, The Law of Copyright, §12.10, at 12-63 (1979).

7. Once the plaintiff has met this burden, the burden shifts to the defendant to prove that his work was not a copy, but rather was an independent creation. Kamar International, Inc. v. Russ Berrie and Co., 657 F.2d 1059, 1062 (9th Cir. 1981).

8. Plaintiff Thompson owns the copyright to the song "Somebody."

9. For purposes of this motion, the defendants have conceded the issue of access to plaintiff's work.

10. There is no substantial similarity of

expression between plaintiff's composition and the defendant's composition. After reviewing the audio cassettes and the lyrics, the Court finds that the ordinary average layperson could not conclude that there existed substantial similarities of expression between the subject works.

11. Further, it is apparent to the Court that there is no substanial similarity of ideas between the subject works.

12. Plaintiff's failure to prove that both substantial similarity of ideas and expression exists as required supports the Court's finding that defendants have not engaged in any copyright infringement.

13. Any conclusion of Law deemed to be a Statement of fact is incorporated therein.

DATED: 19 Jun 86

JAMES M. IDEMAN
United States District Judge

APPENDIX E

FILED
SEP 14 1986
CLERK U.S. DISTRICT COUR
CENTRAL DISTRICT OF CALIFOR
BY DEPU

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

GENE THOMPSON,	) Case No. CV 85-1583
	) JMI (Kx)
Plaintiff,	)
	)
v.	) ORDER GRANTING
	) DEFENDANTS' MOTION
LIONEL RICHIE, et al.,	) FOR COSTS AND
	) ATTORNEYS FEES
Defendants.	)
	)

On September 8, 1986, the motion of Defendants, for costs and attorneys' fees came before the Honorable James M. Ideman, United States District Judge, for consideration.

After full consideration of the moving and responding papers, and the file in this case, IT IS HEREBY ORDERED as follows:

1) GRANT the Motion of Defendants, Richie et al. for full costs in the sum of Two Thousand Six Hundred Sixty-five dollars and Sixty-five cents ($2,665.65). This amount is assessed as follows:

a) computer research costs = $235.65;
b) expert witness fees = $2,190.00; and
c) copyright title report = $240.00.

In light of the Court's ability to award, in its dicretion, costs other than those set out under 28 U.S.C. §1920 and reiterated in the Local Rules, the only reasonable interpretation of "full costs" as provided for in 17 U.S.C. §505 is any and all costs reasonably incurred in the litigation process. Shannon v. United States Department of Housing and Urban Development, 433 F.Supp. 249, 252 (D.C. Pa. 1977). However, "costs" is a term defined by statute and is not to be equated with trial expenses. Abbott Laboratories v. Granite State Insurance Co., 104 F.R.D. 42, 43 (D.C. Ill. 1984). Therefore, in accordance with the decision in Landsberg v. Scrabble Crossword Game Players, Inc., 212 U.S.P.Q. 159, 163-164 (C.D. Cal. 1980), vacated on other grounds, 736 F.2d 485 (9th Cir.), cert. denied, ___ U.S. ___ , 105 S.Ct. 513 (1984), this Court has denied those costs requested for office and clerical services.

2) GRANT Defendants, Richie et al. Motion for Attorneys' Fees in the sum of Thirty-one Thousand Six Hundred Forty-two dollars ($31,642.00).

Under the language of §505, the Court may in its discretion determine whether awarding attorney's fees is appropriate. Although the legislative history for 17 U.S.C. §505 does not restrict the granting of attorney's fees to only frivolous and bad faith litigation, the language of the Ninth Circuit in Jartech, Inc. v. Clancy, 666 F.2d 403, 407 (1982) suggests that under §505 an award of attorney's fees is appropriate as a penalty for frivolous or bad faith litigation.

In the instant case, the Defendants filed a Motion for Summary Judgment on Plaintiff's copyright claim for relief. For purposes of the summary judgment motion, the Defendants conceded the issues of ownership and access to the Plaintiff's musical work. Therefore, the only issue before the Court was whether there was a substantial similarity of ideas and expression between the Plaintiff's song, "Somebody's Got to Love Her" and the Defendant, Richie's song, "Stuck on You".

After listening to the tapes of both songs and reviewing the music sheets, the Court distinctly found that a reasonable person would not find any similarity between the two compositions in their forms of expression or ideas. Therefore, considering all surrounding circumstances in this case, Plaintiff's claim for copyright infringement was frivolous. In the absence of a finding of substantial similarity, the Court finds that the award of attorneys' fees against the Plaintiff is appropriate.

There is no set criteria for assessing reasonable attorneys' fees. The decision is at the discretion of the Court. However, logic would suggest that such an award not encompass duplicative or unnecessary charges. Hensley v. Eckerhart, 461 U.S. 424, 433-434, 103 S.Ct. 1933, 76 L.Ed. 2d 40 (1983). In accordance with this logic, the Court has considered the amount and nature of time spent on this litigation, the ultimate success or failure of various claims in the ligitaton and the reasonableness of the litigation in arriving at its award.

IT IS SO ORDERED.

DATED: _____

_____

JAMES M. IDEMAN
United States District Judge

APPENDIX F

TITLE 17, United States Code

§102. Subject matter of copyright: In general

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

1) literary works;

2) musical works, including any accompanying words;

3) dramatic works, including any accompanying music;

4) pantomimes and choreographic works;

5) pictorial, graphic, and sculptural works;

6) motion pictures and other audiovisual works; and

7) sound recordings.

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

§106. Exclusive rights in copyrighted works.

Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomines, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

§501. Infringement of copyright.

(a) Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 118, or who imports copies or phonorecords into the United States in violation of section 602, is an infringer of the copyright.

(b) The legal or beneficial owner of an exclusive right under a copyright is entitled, subject to the requirements of sections 205(d) and 411, to institute an action for any infringement of that particular right committed while he or she is the owner of it. The court may require such owner to serve written notice of the action with a copy of the complaint upon any person shown, by the records of the Copyright Office or otherwise,

to have or claim an interest in the copyright, and shall require that such notice be served upon any person whose interest is likely to be affected by a decision in the case. The court may require the joinder, and shall permit the intervention, of any person having or claiming an interest in the copyright.

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§505. Remedies for infringement: Costs and attorney's fees.

In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 56, Fed.R.Civ.P. Summary Judgment

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(b) **For Defending Party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) **Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together

with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) **Case Not Fully Adjudicated on Motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of Affidavits; Further Testimony; Defense Required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in

this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

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